APPENDIX G

INTERSTATE COMMERCE COMMISSION,
OFFICE OF THE GENERAL COUNSEL,
Washington, D.C., February 26, 1980.

Re: Liability of Rock Island Estate for Employee Protection
Hon. NANCY L. KASSEBAUM,
U.S. Senate, Washington, D.C.

DEAR SENATOR KASSEBAUM: This responds to your request at the hearing on February 20, 1980 for amplification of my opinion that the Estate of the Rock Island Railroad is liable for employee protection in connection with liquidation proceedings.

My opinion is based primarily on two decisions of the courts in deciding upon the value to be placed on assets of bankrupt railroads required to be transferred. In the first such decision a three-judge district court, in affirming the Commission's valuation of the rail properties of the bankrupt New Haven Railroad required by the Commission to be included in the merged Penn Central, held:

> When the case was last before us, we indicated tentative agreement with that position. We cited authorities which established in our view that a railroad with no reasonable hope of future earnings, such as NH, had a constitutional right * * * to cease operations and liquidate," [*sic*] 289 F.Supp. 440, since to force operation at a loss "would be to take its property without the just compensation which is a part of due process of law." *Railroad Commission of State of Texas* v. *Eastern Texas R.R.*, 264 U.S. 79, 85 44, S. Ct. 247, 249, 68 L.Ed. 569 (1924); *Bullock* v. *State of Florida ex rel. Railroad Commission*, 254 U.S. 513, 41 S. Ct. 193, 65 L.Ed. 380 (1921); *Brooks-Scanlon Co.* v. *Railroad Commission*, 251 U.S. 396, 40 S. Ct. 183, 64 L.Ed. 323 (1920). Despite observations in the Commission's report, 334 I.C.C. at 55-57, we adhere to that view, for reasons fully developed in the recent opinion of the reorganization court, subject only to the qualification that liquidation of NH could not commence until the Commission, acting with appropriate speed under § 1(18) of the Interstate Commerce Act, had issued the certificate of abandonment to which NH would have been constitutionally entitled. We believe this position is also supported by two opinions of Mr. Justice Brandeis which we read as declaring that while Congress may in the public interest subject a

> secured creditor to reasonable delays in realizing on his security, it may not deprive him altogether of his right to sell the rest at public auction. *Louisville Joint Stock Land Bank* v. *Radford*, 295 U.S. 555, 55 St. [*sic*] Ct. 854, 79 L.Ed. 1593 (1935); *Wright* v. *Vinton Branch of Mountain Trust Bank*, 300 U.S. 440, 57 S. Ct. 556, 81 L.Ed. 736 (1937).

New York, N.H. & H.R.R. Co., First Mortgage 4% Bond Holders' Committee v. *United States*, 305 F.Supp. 1049, 1055 (S.D.N.Y. 1969). This holding was at least tacitly approved by the Supreme Court's observation in the *New Haven Inclusion Cases*, 399 U.S. 392 at 461, that "no one here quarrels with the proposition that in the event of a liquidation, New Haven would have been obliged to obtain a certificate from the Commission pursuant to § 1(18) of the Interstate Commerce Act."

The second decision is the decision of the Special Court under the Regional Rail Reorganization Act concerning the values to be assigned properties transferred to Con Rail under the Act. *In the Matter of Valuation Proceedings Under §§ 303(e) and 306 of the Regional Rail Reorganization Act*, 439 F.Supp. 1351 (1977). In addressing the question of whether erosion for operations continued by the various estates during the period prior to conveyance of property to Con Rail should be compensable, the court stated (439 F.Supp. at 1370-71):

> A third proposition is that § 1(18) does not cease to be applicable merely because serious erosion of the property of railroad is taking place. As indicated, the railroads in Brooks-Scanion, Bullock, and Eastern Texas had been through all administrative processes that were required. Despite the desperate situation of the New Haven which had experienced net operating losses for four and a half years before invoking § 77, see *New York, New Haven, and Hartford Railroad Discontinuance of Trains*, 327 I.C.C. 151, 166 (1966), and by 1963 had no prospect for a successful reorganization on the basis of capitalized earnings, see *In re New York, New Haven and Hartford Railroad*, 289 F.Supp. 451, 456 (D.Conn. 1968), Judge Anderson considered that authorization to abandon would have had to be obtained from the Interstate Commerce Commission, *In re New York, New Haven and Hartford Railroad*, 304 F.Supp. at 801; as shown above, the Supreme Court rejected the

> Commission's proposal to take account of an additional year to obtain such authority not because it thought that this was not needed, but because Judge Anderson had already taken into account a reasonable period for obtaining it. 399 U.S. at 463, 90 S. Ct. 2054. Again, as noted in Section III of this opinion, our own decision on the 180-day Appeals held that the Brooks-Scanlon principle had been qualified by requiring compliance with reasonable requirements for administrative approval; perhaps it would have been more accurate to say that the Brooks-Scanlon doctrine needed no such qualification since the administrative process had been exhausted in that case and its two early companions. See also *New York, New Haven and Hartford Railroad First Mortgage 4% Bondholders' Committee* v. *United States*, 305 F.Supp. at 1055; *In re Central Railroad of New Jersey*, 485 F.2d at 215. The validity of this third proposition is in no way impaired by decision, stemming from the *Third Avenue Transit* case, supra, 198 F.2d 703, that a reorganization court cannot properly impair liens by such measures as approving the issuance of trustees' or receivers' certificates or authorizing use of the proceeds of sale of mortgaged properties for operations when the prospect of successful reorganization has disappeared, but instead must direct a trustee to apply for abandonment.

See also *id.* at 1366-67 wherein the Court analyzes the import of the *New Haven* decision cited above.

The above decisions appear to indicate that a certificate of abandonment must be obtained before liquidation can commence. The question then becomes whether the Commission or the court overseeing the reorganization of the Rock Island should, or must, impose labor protective conditions upon its grant of the certificate.[1] Although the matter is not entirely free from doubt, I am inclined to the view that the reorganization court is obligated to impose employee protective conditions upon its grant of a certificate authorizing abandonment. Of course, the priority which the court affords claims for payments under these conditions will to a large extent determine the value of the conditions to the affected employees.

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[1] Section 17(a) of the recently enacted Milwaukee Railroad Restructuring Act (P.L. 96-101) (MRRA) transfers ultimate responsibility for authorizing abandonments from the Commission to the courts overseeing the reorganization of railroads in reorganization at the date of its enactment other than the Milwaukee.

Prior to enactment of the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act), it was settled law that the Commission had broad discretion to determine whether and to what extent labor protective conditions should be included in certificates authorizing abandonment. The Commission customarily, but not always, imposed the so-called Burlington employee protective conditions, which afforded substantially less protection to affected employees than those imposed upon certificates authorizing mergers under former Section 5(2). The *Tennessee Central* case,[2] referred to at the hearing, was one of a number of cases in which the Commission refused to impose employee protection upon abandonment of an entire railroad system. The explanation given by the Commission for refusing to impose employee protective conditions in all of these cases was that it would be inequitable and unwarranted to require further consumption of a railroad's properties for the payment of employees after the railroad ceases operations (333 I.C.C. at 454).

With the enactment of the abandonment provisions of the 4R Act, Commission discretion with respect to the imposition of labor protection on certificates authorizing abandonment was apparently eliminated. Section 1a(4) of the Interstate Commerce Act, as added by the 4R Act, provides:[3]

> Each such certificate which is issued by the Commission shall contain provisions for the protection of the interests of employees. Such provisions shall be at least as beneficial to such interests as provisions established pursuant to section 5(2)(f) of this Act and pursuant to section 405 of the Rail Passenger Service Act (45 U.S.C. 565).

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[2] [*sic*] *Tennessee Central Ry. Co., Abandonment*, 333 I.C.C. 443, 454 (1968), 334 I.C.C. 235, 244-46 (1969).

[3] As recodified at 49 U.S.C. 10903(b)(2), that provision now reads:

> Each certificate shall also contain provisions to protect the interests of employees. The provisions shall be at least as beneficial to those interests as the provisions established under section 11347 of this title and section 565(b) of title 45.

In considering the effect of that provision in an entire system abandonment proceeding following enactment of the 4R Act,[4] the Commission acknowledged that "The precise language of Section 1a(4) of the Act would appear to require imposition of employee protective conditions in all permitted abandonments" (354 I.C.C. at 745) at the same time relying on the statement in the legislative history (H.R. Rep. No. 94-781, 94th Cong., 2d Sess., p. 218) that what ultimately became Section 1a(4) was not intended to change the policy and practice of the Commission in connection with certificates involving total termination of service by a railroad. The Commission concluded that it had discretion not to impose employee protection and, adhering to its prior line of decisions on the subject, it declined to do so. This decision was subsequently followed by a decision of the Commission in a proceeding entitled *Northampton & Bath R.R. Co. — Abandonment*, 354 I.C.C. 784 (1978). Neither of these decisions were appealed to the courts and the time for doing so has long since expired. Accordingly, it must be accepted that the Commission in those cases believed it had discretion not to impose labor protective conditions on entire system abandonments.

However, as indicated, supra, n. 1, Section 17(a)(1) [*sic*] transfers ultimate responsibility for authorizing abandonments by the Rock Island from the Commission to the Court overseeing its reorganization. That section expressly provides that:

> in [*sic*] authorizing any abandonment pursuant to this section the Court shall require the carrier to provide a fair arrangement at least as protective of the interests of employees as that required under Section 11347 of Title 49 of the United States Code.

The conditions developed by the Commission under that section were upheld on review in *New York Dock Railway* v. *United States*, 609 F.2d 83 (2d Cir. 1979) as the minimum level of employee protection required by amendments to former Section 5(2) enacted as a part of

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[4] *Wellsville Addison & Galeton R.R. Corp. — Abandonment*, 345 I.C.C. 744 (1978).

the 4R Act. Thus there would appear to be no doubt as to the level of protection required to be afforded employees, if abandonment is a necessary precondition to liquidation, as I believe it is. Also, there is no legislative history associated with the MRRA comparable to that relied on by the Commission in holding it had discretion under the 4R Act not to impose employee protective conditions on entire system abandonments.

For the foregoing reasons, I am of the view that, regardless of whether the Commission has discretion to decline to impose employee protection upon entire system abandonments, the reorganization court is obligated to impose the so-called New York Dock conditions upon its approval. The value of those conditions will, however, be directly related to the priority the court assigns to employee claims thereunder.

Sincerely yours,

RICHARD A. ALLEN,
General Counsel.